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IN THE

Supreme Court of the United States

October Term, 1973
No. 72-1205

STOVE, FURNACE & ALLIED APPLIANCE WORKERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, LOCAL 123-B,

Petitioner,

vs.

GAFFERS & SATTLER, INC.,

Respondent.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

I.
Introduction.

Respondent's Brief in Opposition to the Petition raises several points which we believe require clarification. Respondent argues that the instant case involves the question of whether arbitration is permissible in a case in which the grievance sought to be arbitrated has been finally determined by the National Labor Relations Board. (Respondent's Brief, p. 2.) As we demonstrate in Section II, the Board, in fact, did not consider or determine the issues which petitioner seeks to have arbitrated and respondent's citation of four Board rulings which purport to deal with such issues is inapposite.

Respondent also argues that the instant grievance is not arbitrable. (Respondent's Brief, p. 9.) In Section III, we demonstrate that the grievance is arbitrable under this Court's holdings in its *Steel Workers Trilogy* decisions.

II.

The National Labor Relations Board Has Not Considered or Determined the Rights of Petitioner Union or Its Members Under the Collective Bargaining Agreement.

Respondent argues that petitioner seeks to arbitrate an issue which has already been conclusively determined by the National Labor Relations Board and cites four Board rulings which purportedly support its argument. A review of the pertinent events in the instant case and an analysis of the Board's action in each of the proceedings cited by respondent demonstrates that the issues which petitioner seeks to arbitrate were never considered or determined by the Board.

The dispute in the instant case resulted from the closing of respondent's Mission plant and the transfer of some of its equipment and all or some of its operations to the site of the Industry plant. Petitioner union represents the former employees at the Mission plant and in this proceeding seeks arbitration under its collective bargaining agreement with respondent of its rights and the rights of its members at the Industry site as a result of the transfer. Respondent takes the position that arbitration should not be ordered because a different union represents the employees at the Industry plant.

Respondent first announced the closing of the Mission plant in November, 1969. The closing of the Mission

plant and transfer to the Industry plant took place about a year later, in October, 1970. The Board proceedings which respondent cites relate to events which span a time period both before and after the announcement of and the actual plant transfer and in no way deal with the rights at the Industry plant of the former Mission plant employees or petitioner under the collective bargaining agreement which is the subject of the arbitration here involved.

The first Board proceeding which respondent cites, Case No. 21-CA-8821, involves events which occurred prior to any announced change at the Mission plant. In August, 1969, Teamsters Local No. 196 achieved recognition as the bargaining agent for certain employees at the Industry plant. Respondent and Local No. 196 entered into a collective bargaining agreement in September, 1969. On October 2, 1969, the petitioner's International Union (not petitioner) filed an unfair labor practice charge with the Board, alleging that Local No. 196 did not represent a majority of the employees at the Industry plant and that the employer had given illegal assistance to Local No. 196 by its August, 1969 recognition and its September, 1969 agreement. On October 23, 1969, the Regional Director declined to issue a complaint in the matter.

Petitioner was neither a party to that proceeding, nor did the proceeding involve any matters relating to the transfer of the Mission plant, equipment and operations, which transfer occurred a year later.

The next Board proceeding cited by respondent is an unfair labor practice charge filed by petitioner on June 4, 1970, four months before the transfer of the Mission plant, alleging that petitioner represented a majority

of the employees at the Industry plant and that failure to recognize and bargain with petitioner violated the National Labor Relations Act (Case No. 21-CA-9287). On June 27, 1970, the Regional Director declined to issue a complaint because at the time petitioner requested recognition, May 13, 1970, there was a recognized incumbent union at the Industry plant (Local No. 196). (The recognition of that incumbent union had occurred more than six months prior to the filing of the charge, and any attack on that recognition was barred by the six month time limit in Section 10(b) of the Act (29 U.S.C. Section 160(b).) The Director's action was upheld on appeal to the Board's General Counsel.

The above Board proceeding took place prior to the transfer of the Mission plant and did not involve any questions relating to the rights of the Mission employees or petitioner union as a result of such transfer or any question relating to the collective bargaining agreement here involved. The Board proceeding related to the Industry plant as organized on June 4, 1970, before the transfer of the Mission plant to the Industry site, and merely involved petitioner's allegation that at that time it represented a majority of the Industry employees.

The demand for arbitration in the instant case involves contract and other rights resulting from and arising out of an existing collective bargaining agreement between petitioner and respondent.

The last two Board proceedings cited by respondent were representation petitions filed by the International, and not by petitioner, seeking an election at the Industry plant. The petition filed on July 14, 1972 (21-RC-12813) was dismissed because it was not timely filed.

The petition filed on September 1, 1972 was also dismissed on the same ground. Neither, therefore, considered the merits of the appropriate bargaining representative at the Industry plant and neither involved in any way the question whether Mission employees had contractually established job rights at the Industry plant.

In conclusion, the Board has never considered or determined the issues involved in the grievance which petitioner seeks to arbitrate: the rights at the Industry site of petitioner union and the former Mission employees arising after October, 1970, the date of the transfer of the Mission plant to the Industry site, and resulting from the collective bargaining agreement between petitioner and respondent.

Even assuming, *arguendo,* however, that, as respondent erroneously contends, the representation issue had been decided by the Board, the issue of job rights has undisputedly never been before the Board. Clearly, therefore, the Board proceedings are irrelevant to the instant demand for arbitration and cannot be a bar to the arbitration of claims to job rights never considered by the Board in any proceeding.

The thrust of respondent's defense and the view of the Ninth Circuit is simply that the transfer rights and other job interests which the Mission employees have with respect to the Industry plant under a valid collective bargaining agreement cannot as a matter of policy be arbitrated and instead must be forfeited merely because the Teamsters represent the employees generally at the plant to which their work has been transferred. Such a harsh, unjust, and irrational conclusion is neither required by nor consistent with national labor policy or the *Trilogy* decisions.

III.

Petitioner's Grievance Raises an Arbitrable Dispute Under the Collective Bargaining Agreement.

Respondent argues that arbitration should not be ordered because petitioner "makes no showing that a remedy on this subject exists in the provisions of the Mission Agreement" (Respondent's Brief, p. 9), apparently contending that the grievance is not arbitrable. This Court's decisions in *United Steel Workers of America v. American Mfg. Co.*, 363 U.S. 564, 80 S. Ct. 1343 (1960) and *United Steel Workers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 80 S. Ct. 1347 (1960) make clear, however, that the grievance in the instant case is arbitrable. Thus, this Court has held that a party to a collective bargaining agreement is entitled to arbitration of a grievance if a claim is, on its face, governed by the contract. The merits of the claim are not to be considered by the court in determining whether arbitration should be ordered. As stated by this Court in the *Warrior* case:

> "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause is quite broad." (*Id.* at 584-585.)

The contract in the instant case contains a broad arbitration clause subjecting all "dispute[s] arising as to the meaning, application or interpretation of this Agreement" to arbitration. The contract contains no exclusionary clause. Respondent has not produced "forceful evidence of a purpose to exclude" from arbi-

tration the issue of the rights of former Mission employees upon relocation of the Mission plant.

Specific language supports petitioner's position that the subject of the dispute is governed by the contract. Thus, the contract provides that "[t]he provisions, terms, or obligations herein contained shall not be affected or changed in any respect by sale, *transfer*, or assignment of the Company with respect to its operations at the plant located at 12611 South Crenshaw Boulevard, Hawthorne, California". (Emphasis added.)

Application of this contract provision to the transfer would entitle the former Mission employees to the job protection they seek. For example, Article X, Section A of the contract provides that seniority entitles an employee to preference in layoff, rehire, *job openings*, promotions and choice of shifts. Section D of that same article provides that layoff will be determined by, among other factors, seniority. Thus, the demand of the former Mission employees to job rights in any new jobs which may be created at the Industry plant as a result of the transfer of their work to that plant is specifically provided for under the contract.

Indeed, respondent has conceded that the rights of the affected employees are provided for by the contract. Respondent, however, contends that Article VI, Section G does not apply to the situation and that Article VI, Section H, providing for severance pay "if it becomes necessary to terminate all or any part of its [respondent's] operation", controls.

Whether the plant was transferred or the operation was terminated is, according to this Court's *Steel Workers Trilogy* decisions, a question to be determined by the arbitrator and not by a court. Indeed, even if it

appears to a court that no specific provision of the contract governs the resolution of the grievance, arbitration should still be ordered. All matters agreed upon between the parties to a collective bargaining agreement are not necessarily covered by specific written provisions in the agreement and gaps in the written agreement may be filled in by the understanding of the parties or the practice in the industry as found by an arbitrator. (*United Steel Workers of America v. Warrior & Gulf Nav. Co., supra.*)

In our petition we demonstrated that an arbitrator could fashion a remedy in favor of the former employees of the Mission plant without interfering with the rights of the employees at the Industry plant. We also suggested that even where the employer has entered into conflicting agreements with two different groups of employees, some procedure should be developed whereby all affected parties have some measure of protection, and noted that tripartite arbitration was one approach which has considerable merit. (Petition, pp. 13-14.)

This Court, as well as lower federal and state courts, has approved tripartite arbitration. Thus, in *Transportation-Comm. Emp. U. v. Union Pac. R.R. Co.*, 385 U.S. 158, 87 S. Ct. 369 (1966), this Court held that tripartite arbitration was required under the Railway Labor Act where the award in an arbitration with one union might conflict with the rights of another union. Likewise, the Court of Appeals for the Second Circuit has ordered tripartite arbitration in a similar situation not involving the Railway Labor Act brought pursuant to Section 301 of the Labor Management Relations Act of 1947, as amended (29 U.S.C. Section 185,

et seq.) (*Columbia Broad. Sys. Inc. v. American Record & Broad. Assn.*, 414 F. 2d 1326 (2d Cir. 1969). The Court of Appeals for the Third Circuit has also approved tripartite arbitration in situations of conflict between two unions and the employer with regard to the same matter. (*Window Glass Cutters League v. American St. Gobian Corp.*, 428 F. 2d 353 (3d Cir. 1970.) Lower courts have also ordered tripartite arbitration in appropriate circumstances. (*Textile Workers Union of America v. Scottex Corp.*, 344 Fed. Supp. 243 (S.D. N.Y. 1972); *N.Y. Mailers Union No. 6 v. N.Y. News*, 326 N.Y.S.2d 369 (N.Y. Sup. Ct. 1972).)

We urge this Court to grant certiorari and consider whether national labor policy requires, as the Ninth Circuit concluded, that workers with contractually established job rights must not only forfeit those rights but also be deprived of their right to arbitration whenever a different union is entrenched at the plant to which their work is transferred.* We suggest that to the contrary, where there is an incumbent union at the second plant, national labor policy requires either that the arbitration agreement be honored in the normal manner or that the tripartite procedure recognized by this Court in *Transportation-Comm. Emp. U. v. Union Pac. R.R. Co., supra*, to be applied to such plant transfer disputes.

Whatever resolution this Court deems appropriate, certainly this is a matter of major significance to workers throughout this country who believe (without justification if the Ninth Circuit is correct) that the contracts which protect their job rights against such arbi-

*In our petition we demonstrated that such workers do not lose their job rights or their right to arbitration where the plant to which their work is transferred is non-union.

trary deprivations are enforceable. Finally, we submit that the increase in plant closings, mergers, consolidations and relocations occurring throughout this nation requires this Court to establish a rational and consistent policy for resolving the disputes affecting employees' basic rights which result from such serious economic dislocations.

Respectfully submitted,

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